ESTATE OF CLIFFORD CELESTINE, Appellant	:	Order Adopting Administrative Law Judge's Recommended Decision and Affirming Acting Area Director's Decision in Part and Reversing It in Part
v.	:	
	:	Docket No. IBIA 94-60-A
ACTING PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	August 2, 1996

This appeal concerns a gift deed for Lummi Allotment 29-X, executed by the sole owner, Clifford Celestine, and approved by the Superintendent, Puget Sound Agency, Bureau of Indian Affairs, in April 1992. The gift deed was executed in favor of Karen Williams, whom Celestine variously described as his niece and his grandniece. Celestine later asked BIA to void the deed, stating that Williams had not complied with her promise to pay him $150 per month. Celestine died in December 1993, and this appeal has been pursued by his estate. Further background information may be found in the Board's September 9, 1994, decision in this case. Estate of Clifford Celestine v. Acting Portland Area Director (Celestine I), 26 IBIA 220 (1994).

In Celestine I, the Board rejected appellant's contention that the gift deed should be voided because Williams had failed to comply with an oral sales contract. However, the Board referred the matter to the Hearings Division of the Office of Hearings and Appeals for an evidentiary hearing and recommended decision by an Administrative Law Judge with respect to two questions: (1) whether Williams exerted undue influence on Celestine or induced him by fraud to gift deed his property to her and (2) whether BIA met minimum standards for approval of a gift deed. The Board noted that it had never addressed the question of whether BIA or the Board has authority to void an approved gift deed and stated that, if the evidence at the hearing showed that fraud or undue influence was involved in this case, the Board would order briefing on the question of the Board's authority to void a gift deed. 26 IBIA at 229. The Board ordered the hearing pursuant to its authority in 43 CFR 4.318 "to exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate," even though it observed that "it [was] not entirely clear that the Board has the authority to correct the kind of error that may have occurred in this case." 29 IBIA at 226.

The case was assigned to Administrative Law Judge William E. Hammett, who held a hearing on May 19, 1995, and issued a recommended decision on April 25, 1996. Pursuant to 43 CFR 4.339, the parties were given an oppor-

tunity to file exceptions or other comments concerning the recommended decision. Only the Area Director filed comments.

With respect to the first question referred to him, Judge Hammett found that appellant failed to show that Williams induced Celestine to execute the gift deed through undue influence, duress, or fraud. No party has objected to that finding, and the Area Director urges the Board to adopt it. Upon review of the record, the Board agrees with Judge Hammett that appellant failed to make these showings. The Board also agrees that appellant bore the burden of making them. The Board adopts Judge Hammett's finding on this question.

With respect to the second question referred to Judge Hammett, concerning BIA's approval responsibilities, the Board stated in Celestine I:

> In the case of a gift conveyance, it is BIA's duty to ensure that the prospective donor understands and intends the effect of his/her action. It is also BIA's duty to make a careful examination of the circumstances to determine whether the transaction is in the donor's best interest. BIA must refrain from approving a gift deed where there is any question as to the donor's intent or where the facts show the conveyance is not in the donor's best interest.

26 IBIA at 228.

Judge Hammett found that BIA failed to meet these standards. The Area Director disagrees with this finding and asks the Board not to adopt it.

In Celestine I, the Board described several concerns it had with BIA's actions in this case, at least as those actions were reflected in the record then before it. In its order of referral for hearing, the Board stated:

> The primary purpose of the hearing will be to determine whether undue influence or fraud was present. However, BIA will also be allowed to present further evidence in support of the Superintendent's approval of the gift deed. While, under normal circumstances, a BIA decision must stand or fall on the written record BIA submits to the Board, the Board believes that, under the circumstances of this case, whatever further evidence may exist should be brought out.

26 IBIA at 228-29.

At the hearing before Judge Hammett, BIA introduced evidence of three other gift deeds which Celestine had executed, in favor of three of his grandchildren, in the two years preceding the April 11, 1992, deed to Williams. These were: a December 4, 1990, gift deed to Darlene Olsen, approved by the Superintendent on December 13, 1990; a November 18, 1991, gift deed to Ronald Olsen, approved by the Superintendent on November 26, 1991; and a November 13, 1991, gift deed to Jessie Felix, approved by the Superintendent on November 26, 1991. Each of the three deeds conveyed a portion of Lummi Allotment 29-X.

The Area Director contends that, given the fact of these earlier gift conveyances, "it was not * * * unreasonable for BIA to have concluded that Celestine fully understood the consequences of a gift versus sale transaction, and that he fully intended to give his property to relatives" (Area Director's Comments at 4). Judge Hammett found these other deeds to be a mitigating factor but, in the end, insufficient to overcome evidence of a lapse in this case.

The other gift deeds, together with their supporting documents, are some evidence that Celestine understood the nature of a gift conveyance. Moreover, the series of gift conveyances might be seen as the result of a conscious decision on Celestine's part to dispose of his property before his death; and Williams, as Celestine's niece or grandniece, might be seen as a logical recipient of property under such a disposition plan.

But there were factors that distinguished the application for this conveyance from the applications for the earlier conveyances. For one thing, Celestine first informed BIA that he wished to sell the property to Williams. For another, after Celestine changed his mind and decided on a gift conveyance, he gave as a justification: "I wish to gift convey for less than the appraised value for the following reason: Karen Williams is helping me financially with $150.00 a month to help with my finances." In Celestine I, the Board stated that these facts, among others, were among the "signs in Celestine's written communications that should have alerted BIA to the need for further investigation." 26 IBIA at 227.

The Agency Realty Specialist testified at the hearing that she knew Celestine had originally intended to sell the property to Williams. She believed, apparently on the basis of a conversation with an employee of the Lummi Nation, that Celestine had decided to gift convey the property to Williams after learning that it would take a while to obtain an appraisal, which was required for a sale (Tr. at 158). 1/ She also testified that she believed Celestine's statement concerning the $150 payments meant that the payments had been initiated in the past and that Celestine was thanking Williams for her help by making the gift conveyance (Tr. at 150, 154-55, 186). The Realty Specialist apparently formed this belief solely on the basis of Celestine's written statement.

The Realty Specialist further testified that, as far as she could remember, she had not spoken to Celestine about the transaction at issue and was not aware that any other BIA employee had discussed the matter with him (Tr. at 162-63). Moreover, she stated, the Superintendent had not discussed the application with her before approving it but had given his approval on the basis of the written record (Tr. at 184-85).

1/ Apparently, Celestine had visited the tribal office, and tribal employees had assisted him in preparing his gift deed application. During the period in which these events occurred, the Nation had not yet contracted the entire realty program for the Lummi Reservation but was responsible for preparing appraisals. It appears that the Nation has since contracted the entire BIA realty program for the reservation.

The testimony of the BIA witnesses tended to show that this gift deed application was handled in a manner similar to Celestine's earlier applications and in accordance with the Agency's standard practice. According to the testimony of the Realty Specialist and the former Agency Realty officer, it is common at the Puget Sound Agency to conduct gift deed transactions entirely by mail, with no personal or telephonic contact with the applicant (Tr. at 193-94, 201-02) and it is also common for the Superintendent to approve gift deed applications without discussing them with either the applicant or Agency staff (Tr. at 191-92). 2/

According to the BIA testimony, it is standard practice to route a gift deed application through various branches of the Agency to check for possible problems. A search of the lease records in this case revealed no lease for Celestine's property. The Realty Specialist testified that, if the search had shown that Celestine was receiving lease income from the property, BIA probably would have questioned the proposed gift conveyance (Tr. at 166). From other testimony at the hearing, it appears that Celestine was leasing the property informally, i.e., without BIA involvement, and had been receiving about $200 a month in rent, at least through August 1991 (Tr. at 108-09). This informal lease, of course, did not show up in BIA records. Nor was it evident from Celestine's application for gift conveyance, which did not indicate that he was receiving lease income. Although BIA employees had no reason to suspect that the property was leased, they might, as Judge Hammett observed, have learned about the lease if they had spoken to Celestine, by telephone or otherwise. 3/

Unfortunately, the BIA testimony at the hearing did little to alleviate the concerns expressed in Celestine I with respect to BIA's handling of this gift deed application. Whether or not the Agency's standard practice would be adequate for most gift deed applications, it was not adequate in this case, where questions concerning Celestine's true intent were obvious from the face of his written communications. The Board finds that, under the circumstances here, BIA should not have approved the gift deed without having contacted Celestine, in person or at least by telephone, to clarify his intent.

2/ It appears that the principal reason for handling transactions by mail is the distance between the Agency and some of the reservations under its jurisdiction. While the distance might preclude or discourage applicants from making personal visits to the Agency, it would not preclude BIA staff from contacting applicants by telephone.

Presumably, with the Nation's contracting of the realty program, the distance problem has been resolved, at least for the Lummi Reservation. That is, tribal employees should now be performing the staff work formerly performed by BIA staff and, with the advantage of an on-reservation location, should have a greater opportunity to meet in person with gift deed applicants.

3/ There is no indication in the record that on-site inspections are standard practice at the Agency in the case of gift deed applications. However, an on-site inspection in this case would presumably have revealed that the house on the property was occupied.

One concern the Board noted in Celestine I was the fact that BIA had "crossed out the standard printed certification on the application form, pursuant to which the Superintendent would have attested that the 'effect of this application was explained to and fully understood by the applicants.'" 26 IBIA at 226. As Judge Hammett observed, "by striking the above language from the application, the Superintendent removed the very language which would have established, at least prima facie, that the effect of the application was understood by the applicant" (Recommended Decision at 9).

At the hearing, the Realty Specialist testified that it was standard practice at the Agency to cross out this certification, because, as she explained: "We interpret that to mean that the Superintendent would be the one to fully explain the Application, but he doesn't. All he does is either approve or disapprove" (Tr. at 134. See also Tr. at 191).

With respect to this appeal, deletion of the certification language creates, as Judge Hammett noted, a problem of proof. However, the practice of deleting the language, as it was described by the Realty Specialist, could have larger implications for the approval of gift deed transactions in general. That is, lacking the incentive provided by the certification statement, a Superintendent might be less inclined to require adequate background work by his staff (or tribal staff in the case of contracted realty programs). Despite the concern expressed by the Realty Specialist, the certification language does not require the Superintendent to attest that he personally explained the effect of a gift deed to the applicant or that he personally observed that the applicant understood the explanation. Rather, it requires only that he attest that "the effect of the application was explained to and fully understood by the applicant." Thus, the language allows the explanation to be given by other BIA or tribal staff. Of course, in order to sign the certification, the Superintendent should be fully satisfied that the required explanation has been given and the required understanding accomplished. 4/

In light of the role the certification statement plays as a safeguard, the Board strongly encourages the Area Director to direct the Superintendent to abandon the practice of deleting the certification statement.

Returning to the case at hand, the Board finds itself in an unusual position in that, although it agrees with Judge Hammett that BIA failed in its obligation toward Celestine, it is not aware of any relief which it has authority to grant appellant. Even if the Board has authority to void a gift deed on grounds of fraud or undue influence--a question the Board does not reach--neither fraud nor undue influence has been shown here.

It appears that the only possible remedy here would be money damages, which the Board lacks authority to award. E.g., U.S. Fish Corp. v. Eastern Area Director, 20 IBIA 93 (1991); Kays v. Acting Muskogee Area Director, 18 IBIA 431 (1990).

4/ To support his approval decision, the Superintendent should require written evidence from BIA or tribal staff which, at a minimum, would enable him to sign the certification with confidence. This supporting evidence should then become a part of the record for the transaction.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Hammett's recommended decision is adopted. The Area Director's January 11, 1994, decision is affirmed insofar as the Area Director found no evidence of fraud or undue influence and insofar as it declined to void the gift deed to Williams. It is, however, reversed to the extent the Area Director found that the Superintendent did not err in approving the gift deed.

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Anita Vogt
Administrative Judge

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Kathryn A. Lynn
Chief Administrative Judge